

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOSE V. MICHEL)	
Claimant)	
)	
VS.)	
)	
NATIONAL BEEF PACKING COMPANY)	
Respondent)	Docket No. 270,798
)	
AND)	
)	
CONNECTICUT INDEMNITY CO.)	
Insurance Carrier)	

ORDER

This is a post-award dispute involving claimant's request for penalties and attorney's fees under K.S.A. 44-512a. The ALJ rejected claimant's request finding "[t]he [d]emand for [c]ompensation was mailed on July 20, 2005. The Motion for Penalties was mailed on August 9, 2005, on the 20th day. The motion was filed prematurely."¹

ISSUES

Claimant appealed the Order and contends the ALJ's denial of his request for penalties was "contrary to the law."² Claimant maintains the motion for penalties was *served* upon respondent's lawyer on August 9, 2005, 20 days after the effective date of the Court of Appeal's July 15, 2005 Memorandum Opinion and *filed* with the Division on August 10, 2005, the 21st day. And the penalties hearing was not held until October 14, 2005, nearly 3 months after the Memorandum Opinion. Thus, under K.S.A. 44-512a, claimant maintains her demand was not only timely but sufficiently specific and adequately provided the notice contemplated by the statute. Accordingly, claimant argues the ALJ

¹ ALJ Order (Oct. 14, 2005).

² Claimant's Brief at 1 (filed Nov. 4, 2005).

erred in failing to grant his request for penalties and attorneys fees associated with the \$94.16 claimant now contends is due and payable.

Respondent contends first, that claimant's July 20, 2005 demand was premature and therefore invalid.³ Respondent also maintains the demand failed to set forth the accurate amount of money claimant now believes is owed. And finally, that claimant failed to properly provide the statutorily required notice to respondent or its carrier in addition to the notice given to respondent's lawyer. For any or all of these reasons, respondent maintains the ALJ appropriately denied claimant's request for penalties and attorney's fees.⁴

The issues for the Board to consider are as follows:

1. Was claimant's demand premature? And if not, -
2. Was claimant's demand served properly as required by K.S.A. 44-512a?
3. Was claimant's demand sufficiently specific?
4. If the demand was proper in all respects, what penalty is reasonable and fair under these facts? and
5. Are attorney's fees owed?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the pertinent record, the Board finds and concludes the ALJ's Order should be affirmed in all respects, but for a different reason.

On July 15, 2005, the Kansas Court of Appeals issued its Memorandum Opinion affirming the Board's decision. Claimant was awarded benefits totaling \$100,000 less any sums previously paid. The parties' stipulated that claimant had been paid \$12,224.16 in temporary total disability benefits.

On July 20, 2005, claimant sent a demand letter to counsel for respondent. That demand letter was sent certified mail and was apparently received by Mr. Torline on July 22, 2005. No corresponding letter was sent to respondent or its carrier.

³ Respondent's Brief at 3 (filed Nov. 14, 2005).

⁴ Respondent's counsel did not challenge or dispute claimant's counsel's itemized statement of her time and expenses associated with this post-award motion.

On August 9, 2005, claimant mailed a Motion for Penalties to respondent's counsel. This Motion indicated respondent and its carrier owed \$89,300.49.⁵ This Motion for Penalties was filed with the Division on August 10, 2005.

Respondent's counsel then faxed a letter to claimant's counsel on August 11, 2005 indicating that a check in the sum of \$66,800.72 was going to be forwarded immediately.⁶ That check was received and cashed by claimant's counsel.

On October 14, 2005, a hearing on the claimant's Motion for Penalties was heard. Apparently, both parties' counsel traveled from their respective offices in Wichita, Kansas to Liberal, Kansas to attend this hearing without first communicating with the other about the status of this dispute. During the course of that hearing, claimant acknowledged respondents carrier had recently issued a check in the sum of \$66,800.72, but argued that payment left a balance of \$94.16 owed on the total \$100,000 Award. This was the first notice respondent had that claimant believed there was a shortfall in respondent's payment following the July 20, 2005 demand. Thus, respondent not only objected to the lack of specificity in claimant's demand, but also that the demand had not been properly served upon both respondent or its carrier *and* its lawyer as required by K.S.A. 44-512a.

The Workers Compensation Act provides that penalties may be awarded to workers when their employers or their employers' insurance carriers fail to pay compensation after it has been awarded and after it has become due. The Act, however, requires a worker to serve written demand for payment which sets forth with particularity the compensation claimed to be unpaid and past due. The Act provides a 20-day grace period following receipt of the written demand for the employer or its insurance carrier to pay the compensation and avoid the civil penalty. K.S.A. 44-512a provides, in part:

(a) In the event any compensation, including medical compensation, which has been awarded under the workers compensation act, is not paid when due to the person, firm or corporation entitled thereto, the employee shall be entitled to a civil penalty, to be set by the administrative law judge and assessed against the employer or insurance carrier liable for such compensation . . . if: (1) Service of written demand for payment, setting forth with particularity the items of disability and medical compensation claimed to be unpaid and past due, has been made personally or by registered mail on the employer or insurance carrier liable for such compensation **and** its attorney of record; and (2) payment of such demand is

⁵ According to the demand, claimant believed there were 48 weeks of temporary total disability compensation at the rate of \$348.83 due along with 208 weeks of permanent partial disability at the same rate. This totals \$89,300.49.

⁶ According to respondent, this figure represents the difference between the amounts of temporary total and permanent partial disability benefits paid before the Court of Appeals' decision, \$33,199.28 and the statutory cap of \$100,000.

thereafter refused or is not made within 20 days from the date of service of such demand. (Emphasis added)

Accordingly, the first question to address when considering penalties is what compensation was past due and payable when claimant served his written demand for payment. In *Hallmark*,⁷ the Kansas Supreme Court held compensation awarded was not due until the time for filing an appeal had expired.

Under K.S.A. 1969 Supp. 44-556 no compensation is due or payable until the expiration of twenty days after the director has made and filed his award, and a statutory demand for payment of compensation served during such period is ineffective and forms no basis upon which to predicate an action under K.S.A. 44-512a.⁸

In applying the *Hallmark* analysis to the instant action, it appears that the claimant's demand, which was sent on July 20, 2005, the 4th day after the effective date of the Court of Appeals' decision was premature.⁹ Respondent still had the option of petitioning for review with the Supreme Court under K.S.A. 60-2101. Although neither party seemed to focus on this possibility, nevertheless this is an option that was available to respondent and its carrier. And until the Court of Appeal's Order became final and the mandate issued, no compensation was due.¹⁰ So, while the ALJ and the parties focused on the prematurity of the claimant's filing of his motion with respect to the 20 day period, in reality the focus should have been on the prematurity of the demand.

Although the ALJ concluded claimant's Motion for Penalties was premature because it was mailed on August 9 and filed on August 10, 2005, before the expiration of the 20 day grace period *after* service of the demand, she was nonetheless correct in her assessment that claimant's demand was premature. Accordingly, the Board affirms the ALJ's Order.

Given this finding, the balance of the issues are moot, other than claimant's request for attorney's fees. The Board concludes that the ALJ appropriately denied this request. The law on the issue of prematurity of a demand is well settled. And the Board finds it would be unjust for premature demands to be rewarded. Thus, attorney fees are denied and the ALJ's Order is affirmed in all respects.

⁷ *Hallmark v. Dalton Construction Co.*, 206 Kan. 159, 476 P.2d 221 (1970).

⁸ *Id.* at Syl ¶ 2.

⁹ K.S.A. 60-206(a)

¹⁰ See *Wortham v. Wal-Mart*, No. 213,499, 2000 WL 1134427 (Kan. WCAB Jul. 31, 2000).

WHEREFORE, the Board finds the October 20, 2005 Order of Pamela J. Fuller is hereby affirmed.

IT IS SO ORDERED.

Dated this ____ day of December, 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Diane F. Barger, Attorney for Claimant
Terry J. Torline, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director